Supreme Court, U.S.
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No. 02-213

In The
Supreme Court of the United States

JEANETTE C. HOWER,

Petitioner,

vs.

PACIFICARE OF CALIFORNIA and PACIFICARE HEALTH SYSTEMS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The petition requests this Court to consider the following question:

> ERISA's saving clause provides that ". . . *nothing in this subchapter* shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ." 29 U.S.C. § 1144(b)(2)(A) (Emphasis added.)
>
> Since ERISA's civil remedies provision is in the same subchapter as the saving clause, doesn't the language and structure of ERISA require that the remedies provision be subject to the saving clause with the result that all state laws that regulate insurance are saved – even if they create a remedy that supplements ERISA's civil remedies?

LIST OF PARTIES AND RULE 29.4(c) LIST

The parties to the proceeding below were the petitioner Jeannette C. Hower, and respondents PacifiCare Health Systems, Inc. and PacifiCare of California.

Respondent PacifiCare Health Systems, Inc. wholly owns PacifiCare Health Plan Administrators, Inc., and in turn wholly owns respondent PacifiCare of California. PacifiCare Health Systems, Inc. is publicly held, and Capital Group International, Inc. is the only publicly held company that owns 10% or more of its stock.

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STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1144(b)(2)(A) i

JURISDICTION

Respondents do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The petition properly sets forth the statutes and regulations pertinent to the issues raised in the petition.

STATEMENT OF THE CASE

Respondents respectfully submit that the unpublished opinion of the Ninth Circuit contains an accurate description of the proceedings below. (Pet. App. 2A-3A.)[1]

SUMMARY OF ARGUMENT

This case presents no issue warranting review by this Court. In an unpublished two-page memorandum decision, the Ninth Circuit scrupulously followed this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) as well as uniform Ninth Circuit authority in holding that plaintiff's claim against her employer's group health plan for breach of the implied covenant of good faith and fair dealing under California law was expressly preempted under ERISA. The Court rejected plaintiff's contention that the tort

[1] The petition for certiorari is cited as "Pet. ___." The appendices to the petition are cited as "Pet.App. ___."

claim constituted a state law regulating the business of insurance within the savings clause and held that in any event, such alternative, additional State remedies were inconsistent with, and hence preempted by, ERISA's exclusive civil enforcement provisions. (Pet.App. 2A-3A.)

Petitioner asks this Court to reexamine *Pilot Life*. However, only last term in *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002), all nine members of this Court had expressly reaffirmed *Pilot Life*'s clear statement that additional State remedies were inconsistent with and hence preempted by the ERISA civil remedies provision. Moreover, the very premise of petitioner's argument – that a cause of action for breach of the implied covenant of good faith and fair dealing constitutes a State law regulating insurance – is flatly contrary to both *Pilot Life* and governing California Supreme Court authority. There is nothing unique to insurers about a claim for breach of the implied covenant of good faith and fair dealing because the covenant is implied in *every* contract under California law.

There is no conflict among the Circuits. There is no conflict with the highest court of any State. There is no conflict with this Court's decisions. Plainly, this case presents no grounds for review in this Court.

WHY CERTIORARI SHOULD BE DENIED

THE PETITION SHOULD BE DENIED BECAUSE A TORT CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING DOES NOT REGULATE THE BUSINESS OF INSURANCE WITHIN THE SAVINGS CLAUSE OF ERISA, AND IN ANY EVENT THIS COURT HAS RECENTLY REAFFIRMED THE HOLDING OF *PILOT LIFE* THAT ADDITIONAL STATE LAW REMEDIES ARE PREEMPTED BY THE EXCLUSIVE REMEDIES PROVIDED IN ERISA.

Petitioner sought to bring her claim for breach of the implied covenant of good faith and fair dealing against respondent premised upon the savings clause of ERISA. Petitioner contended that a cause of action for breach of the implied covenant of good faith and fair dealing brought against an insurer constituted a State regulation of insurance under the savings clause. At the same time, petitioner argued that even to the extent that a tort claim for breach of the implied covenant of good faith and fair dealing would afford her remedies over and above those provided by ERISA, that nonetheless such a claim should not be preempted by the exclusive remedies provisions of ERISA.

As the Ninth Circuit properly found, petitioner's contentions are inconsistent both with California law, and the governing decisions of this Court. Thus, this case presents no valid issue for review.

A. The Covenant Of Good Faith And Fair Dealing Is Implied In Every Contract Under California Law And Hence Cannot Constitute A Law Regulating The Business Of Insurance Under *Pilot Life*.

The petition for certiorari repeatedly refers to an alleged California common law tort of "insurance bad faith." Yet, no such tort exists. Rather, California recognizes a cause of action for tortious breach of the implied covenant of good faith and fair dealing. The underpinnings of that cause of action are not unique to insurance companies – they spring from the implied existence of the covenant of good faith and fair dealing in *all* contracts. As this Court noted in *Pilot Life*, this necessarily means that such a claim is not a law regulating the business of insurance.

In *Pilot Life*, the question before the Court was whether a Mississippi common law cause of action for tortious breach of the implied covenant of good faith and fair dealing against an ERISA plan insurance company fell within the preemption provisions of ERISA. In determining whether the common law claim constituted a law regulating insurance, the court looked to the factors generally applied in determining whether a state law regulated insurance under the McCarran-Ferguson Act. The "guideposts" used in such cases include whether or not the state law affected the spreading of risk, whether it was confined solely to the insurance industry and whether it was integral to the insurer-insured policy relationship. *Pilot Life*, 481 U.S. at 48-49. The Mississippi law failed to meet the first McCarran factor since it had nothing to do with spreading risk. 481 U.S. at 50. Critically, the Court concluded that the common law claim also failed other

McCarran factors in that it was not unique to the insurance industry nor integral to the policy relationship between insurer and insured. 481 U.S. at 50-51. This is because, while Mississippi has "identified its law of bad faith with the insurance industry," nonetheless under Mississippi law the implied covenant of good faith and fair dealing existed and was actionable with respect to *all* contracts. 481 U.S. at 50.

Similarly, the California Supreme Court has repeatedly held that under California law "it is well established that a covenant of good faith and fair dealing is implicit in every contract." *Cates Construction, Inc. v. Talbot Partners*, 21 Cal. 4th 28, 43, 86 Cal. Rptr. 2d 855, 980 P.2d 407 (1999); *see also Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211, 765 P.2d 373 (1988). Thus, a cause of action for breach of that provision may be brought in the context of any contractual relationship and a party may always obtain damages based upon breach of the implied covenant. *Id.*

Petitioner argues that since California has heretofore limited application of the *tort* remedies for breach of the implied covenant of good faith and fair dealing to actions against an insurer, this necessarily means that this is a common law regulating insurance. However, the argument is untenable.

First, in *Pilot Life*, this Court looked at the source of the parties' obligations, not the availability of a particular remedy in determining whether a common law claim regulated insurance. Since the source of the bad faith claim – the implied covenant – existed in all contracts under Mississippi law, an action for breach of that obligation, whether sounding in contract or tort, could not be

said to be directed at regulating insurance. 481 U.S. at 51-53.

Second, the California Supreme Court has repeatedly emphasized that a cause of action for tortious breach of the implied covenant of good faith and fair dealing is not spawned by the identity of the defendant, i.e., by whether it is an insurance company, but rather by the nature of a particular contractual relationship. Thus, in *Cates*, the California Supreme Court held that a cause of action for tortious breach of the implied covenant could not be maintained against a surety bond company even though the California Insurance Code expressly identified such bonds as a type of insurance. 21 Cal. 4th at 52. Instead, the Court noted that the availability of a tort remedy for breach of the implied covenant is determined by application of various criteria to the particular contract relationship at issue. These include whether the contract is characterized by elements of adhesion and unequal bargaining power, public interest and fiduciary responsibility. 21 Cal. 4th at 52; *see also Foley v. Interactive Data Corp.*, 47 Cal. 3d at 684-85. Thus, under California law the tort of breach of the implied covenant of good faith and fair dealing is not confined to a particular relationship, i.e., insurer-policyholder, but is available in any contract action where the objective criteria are met. As the Court succinctly held in *Cates*, such a remedy is available any time a contract is "marked by elements of adhesion, public interest or fiduciary responsibility, such that an extracontractual remedy is necessitated in the interests of social policy." 21 Cal. 4th at 60.

Indeed, one of the very cases petitioner cites – *Kransco v. American Empire Surplus Lines Ins. Co.*, 23

Cal. 4th 390, 97 Cal. Rptr. 2d 151, 2 P.3d 1 (2000) underscores the fact that the availability of a tort claim for breach of the implied covenant is not based solely on the existence of an insurer-insured relationship, but rather on application of objective factors concerning the general contractual relationship between parties. In *Kransco*, the California Supreme Court held that an insurer could not assert a defense of comparative tortious breach of the implied covenant of good faith and fair dealing by its insured. Contrary to petitioner's characterization of *Kransco*, the Court's conclusion was not based upon its determination that such tort claims were confined to, and hence meant to regulate, "insurers." Rather, the key factor for the Court was that the objective criteria concerning the contractual relationship that justified a tort remedy against insurers were not present with respect to a claim against the insured – the insurer was not at a disadvantage because it was in an "unequal" bargaining position vis-a-vis its insured, nor did the insured's alleged breach of the implied covenant impact "social policy" considerations. *See* 23 Cal. 4th at 400, 404-06 (" 'A relationship including specialized circumstances of reliance and dependence is necessary to transmute such a contractual breach into a tort. Such circumstances do not exist in the context of an insured's responsibilities toward its insurer, or in the reciprocal context of insurer's legitimate expectations from its insured.' ").

Plainly, under California law recovery for breach of the implied covenant of good faith and fair dealing is not limited to the insurance context, and the California Supreme Court has made it clear that tort recovery will be available in any context in which a particular contract meets the criteria necessary to justify imposition of such

liability. Therefore, consistent with this Court's previous decision in *Pilot Life*, a cause of action for breach of the implied covenant of good faith and fair dealing does not, under California law, constitute a law regulating the business of insurance.

B. There Is No Basis For This Court To Re-examine The Conclusions Set Forth In *Pilot Life* And Reaffirmed Just Last Term In *Rush Prudential HMO, Inc. v. Moran*, That The Remedies Provided In ERISA Pre-empt State Claims Providing Additional Remedies.

As previously noted, in *Pilot Life* this Court held that a claim for breach of the implied covenant of good faith and fair dealing against an insurance company relating to an ERISA plan did not constitute a law regulating the business of insurance for purposes of the savings clause of ERISA. At the same time, however, the Court noted that regardless of whether the claim fell within the savings clause, plaintiff's action would still be preempted by the exclusive remedies provision of ERISA. 481 U.S. at 54-57.

The Court's decision solidly rested on the legislative history of ERISA which made clear Congress' intention that there be uniformity in remedies with respect to claims arising from the processing of claims by ERISA plan participants:

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefits plans. The policy

> choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

481 U.S. at 54.

Critically, the Court emphasized that the interest in uniformity of remedies necessitated preemption not simply of remedies that conflicted with those that were available under federal law, but also those which were offered to supplement federal remedies:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA [Labor-Management Relations Act of 1947], would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.

481 U.S. at 56.

Only last term, in *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___, 122 S. Ct. 2151, the Court reaffirmed *Pilot Life*'s conclusion in this regard. In *Rush*, the Court found that a State law mandating independent review of disputes between primary care physicians and HMOs fell within the savings clause as a law regulating the business

of insurance, but found that it did not run afoul of the exclusive remedies provisions of ERISA because it "provides no new cause of action under state law and authorizes no new form of ultimate relief." 122 S. Ct. at 2167. The Court noted, however, that "[t]o be sure, a State might provide for a type of 'review' that would so resemble an adjudication as to fall within a *Pilot Life*'s categorical bar." 122 S. Ct. at 2168. Thus, the Court reaffirmed the continuing application of *Pilot Life*'s interpretation of the exclusive remedial scheme of ERISA. And, of course, the dissenting members of the Court in *Rush* fully embraced *Pilot Life*, and differed from the majority only in that they would have found the State statute at issue in *Rush* to have provided precisely the sort of additional alternative remedy that is inconsistent with the ERISA remedial scheme and hence preempted. 122 S. Ct. at 2175.

Petitioner has provided no basis for this Court to yet again reexamine its clear statement in *Pilot Life*, particularly when only last term the Court thoroughly discussed the issue and reaffirmed *Pilot Life*'s interpretation of the exclusive remedial scheme of ERISA. Thus, the petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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